BEFORE THE INSURANCE COMMISSIONER
OF THE STATE OF CALIFORNIA

In the Matter of the Rates, Rating Plan, or Rating Systems of **ALLSTATE INDEMNITY COMPANY, AND ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY,** Respondents.	)	**FILE NO. NC 01017552**

The Proposed Decision of Chief Administrative Law Judge Andrea L. Biren dated January 22, 2004 was adopted as the Insurance Commissioner's decision in the above-entitled matter. This order shall be effective March 31, 2004.

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PROPOSED DECISION

Introduction

This decision adopts the attached Stipulation for Settlement in the above-entitled case, thereby proposing approval of a settlement of a noncompliance case brought under Insurance Code 1858 et seq. This case was initiated by a consumer complaint under Insurance Code section 1858. It is based, at this juncture, on a Fifth Amended Notice of Noncompliance ("the Notice") setting forth an initial finding by the Insurance Commissioner of good cause to believe that there had been violations of California Insurance Code ("CIC") Sections 1861.02, 1861.03, 1861.05, and 1861.16 and California Code of Regulations ("CCR") Sections 2632.4, 2632.5 and 2632.14 by Respondents,

Allstate Insurance Company, Allstate Indemnity Company, and Allstate Property and Casualty Company, (collectively, "Respondents" or "Allstate").

Specifically, the Notice recited that Respondents instituted a series of new procedures which deterred prospective insureds from obtaining a private passenger automobile policy from Respondents. At various times, these procedures included: 1) requiring a 50% premium down payment on all new policies; 2) requiring 100% premium down payment on all new policies; 3) using a credit scoring model for new business to determine company placement, rates, and payment plans; 4) requiring a seven day future effective date for all new private passenger automobile policies; and 5) ceasing to write new private passenger automobile policies in the Allstate Indemnity Company. The Notice also indicated that Respondents had changed late payment procedures and improperly canceled and/or nonrenewed private passenger automobile policies. Allstate denies that it has violated any laws or regulations by its actions.

The parties in the case are the California Department of Insurance ("CDI" or "the Department"), represented by Lara Sweat, Donald Hilla, and MaryAnn Shulman and the Allstate companies, represented by Thomas E. McDonald and Sanford Kingsley of Sonnenschein Nath & Rosenthal and Delia M. Chilgren of Allstate Insurance Company. The law firm of James, Hoyer, Newcomer & Smiljanich, P.A. was granted intervener status,[1] and was represented by Christa Collins and Kendra Mancusi.

Procedural History and Statement of Facts

In or about December 2001, a consumer filed an Insurance Code section1858

[1] The intervener is not a signatory to the settlement stipulation, but has not objected to the stipulation either.

complaint with the Department alleging that several procedures implemented by Respondents violated Chapter 9 of the California Insurance Code. The procedures at issue at that time were: 1) requiring 100% premium down payment on all new policies; 2) the use of credit reports and performance of a "risk assess" for all new business; and 3) a seven day future effective date for all new private passenger automobile policies.

Pursuant to Insurance Code section 1858.1, the Commissioner found good cause to believe that Respondents were not in compliance with the California Insurance Code and a notice of noncompliance was issued which described the manner and extent to which the noncompliance was alleged to exist on February 27, 2002. Respondents denied noncompliance and requested a hearing on the matter on March 22, 2002. The matter was assigned for hearing to Chief Administrative Law Judge Andrea L. Biren.

During the course of prosecuting this matter, the Department filed amended notices of noncompliance to allege additional violations. The last notice, the Fifth Amended Notice of Noncompliance ("FAN"), was filed on June 10, 2003. In the FAN, the Department alleged that beginning in March 2001, Respondents implemented a series of new administrative requirements in order to avoid offering good drivers new policies as required by Proposition 103. The Department alleged that these administrative requirements were implemented to restrict, curtail and otherwise decrease the number of new automobile policies being written in California in order to slow down new business growth. The alleged requirements at issue were: 1) requiring higher premium down payment amounts from new business; 2) requiring new business to wait seven days for a policy to be effective; 3) failing to offer new business an Allstate Indemnity Company policy; 4) improper cancellation and nonrenewal procedures. The Department also alleged in the FAN that Respondents' improper use of their credit scoring program resulted in unfair discrimination in both rating and underwriting private passenger automobile insurance in California.

Respondents have filed responses to the notices, including the FAN, denying that they have violated the cited provisions of law.

Litigation of the case ensued over a long period, with intense disputes over, among other matters, the Administrative Law Judge's authority to dismiss part or all of the notice, the grant of intervener status to a Florida law firm, and discovery of and subpoena requests for an Allstate proprietary formula and Department documents. Settlement talks were begun and ended several times, and Allstate filed at least one writ petition in superior court. Pre-filed written testimony was received, objected to, and admitted or stricken, as were numerous exhibits. Thus, a partial record was established.

The live evidentiary hearing in this matter was scheduled to begin November 19, 2003. Shortly before that date, the Administrative Law Judge received a request from all parties to take the matter off-calendar because a stipulation for settlement would be forthcoming. The stipulation for settlement attached hereto and incorporated by reference herein was filed on January 6, 2004.

The Stipulation for Settlement is executed by representatives of each of the parties; it establishes, among other things, that:

1. The compromise settlement is not an admission of liability, wrongdoing or violation of law, and no factual findings or legal conclusions have been made.
2. As of July 7, 2003, Respondents have stopped using the administrative procedures alleged in the FAN to be in violation of the California Insurance Code and California Code of Regulations. Respondents have also stopped using their credit-scoring program in their private passenger automobile lines.
3. Respondents shall pay to the Department a penalty in the amount of three million dollars ($3,000,000). Respondents shall pay the penalty within thirty

days after receiving an invoice for this amount from the Department.

4. While the Stipulation constitutes a settlement and full and final release of all issues arising from acts covered in the FAN up to the date of this Stipulation, nothing in the Stipulation precludes any action of the Department in pursuing further action against Respondent for failure to correct the actions that are the subject of the Stipulation;
5. Nothing contained in the Stipulation constitutes a limitation upon, or a waiver of, the rights and powers of the Commissioner to pursue an enforcement action as a result of the examination of the rating and underwriting practices of Respondents conducted by the Department's Field Rating and Underwriting Bureau which occurred during the period of January 1, 2000 to April 1, 2002, except with respect to all acts, practices, and matters settled or resolved by the Stipulation;
6. Nothing contained in the Stipulation constitutes a limitation upon, or a waiver of, the rights and powers of the Commissioner to enforce the California Insurance Code or the California Code of Regulations with respect to the transaction of insurance by Respondent, except with respect to all acts, practices, and matters settled or resolved by the Stipulation; and
7. The Commissioner retains jurisdiction to ensure that the parties comply with the provisions and terms of the Stipulation.

This proposed decision followed.

Discussion

1. *The Standard For Review Of The Stipulation For Settlement*

The Administrative Procedure Act provides that an agency may formulate and issue a decision by settlement, pursuant to an agreement of the parties, without conducting an adjudicative proceeding, and on any terms the parties determine are appropriate so long as the terms are not contrary to statute or regulation, except that the settlement may include sanctions the agency would otherwise lack power to impose. (Government Code section 11415.60.) Thus, while the general authority to settle a case has been granted, neither the statutes nor the regulations governing noncompliance cases[2] under the Insurance Code explicitly set forth a standard for approving a settlement.

In rate proceedings under the Insurance Code, the provisions of section 2656.2 of title 10, California Code of Regulations, are applicable to a stipulation for settlement. Subdivision (a) of section 2656.2 provides:

> The administrative law judge shall reject a proposed stipulation or settlement whenever, in his or her judgment, the stipulation or settlement is not in the public interest and is not, taken as a whole, fundamentally fair, adequate and reasonable. . . .

This standard is appropriate as well for noncompliance cases that arise from a consumer complaint and/or have interveners. While the Insurance Commissioner is at all times acting on behalf of the public, such cases are particularly imbued with the public interest and require a special scrutiny. The standard for rejection stated in section 2656.2

[2] As noted previously, the relevant Insurance Code sections are 1858 et seq. and the regulations are found at title 10, California Code of Regulations sections 2615-2615.3.

is substantially a restatement of the standard applied by courts when reviewing class action settlements and by the California Public Utilities Commission when reviewing settlements in rate cases similar to the rate cases before the Department of Insurance. (See, *Officers for Justice v. Civil Service Commission of the City & County of San Francisco* (9th Cir. 1982) 688 F.2d 615, 625, cert.denied 459 U.S. 1217 (1983); *In Re PG&E (Diablo Canyon)* (1988) 30 Cal. P.U.C.2d 189, 222.)

In *Dunk v. Ford Motor Co*. (1996) 48 Cal.App.4th 1801-1803, 56 Cal.Rptr.2d 483, a California court explained the purpose of a review of a settlement and the appropriate analysis:

> "'"[T]o prevent fraud, collusion or unfairness to the class, settlement or dismissal of a class action requires court approval."'" (*Malibu Outrigger Bd. Of Governors v. Superior Court* (1980) 103 Cal.App.3d 573, 578-579, 165 Cal.Rptr. 1; see also *Marcarelli v. Cabell* (1976) 58 Cal.App.3d 51, 55, 129 Cal.Rptr. 509.) The court must determine the settlement is fair, adequate, and reasonable. (See *Officers for Justice v. Civil Service Com.* (9th Cir.1982) 688 F.2d 615, 625; Fed. Rules Civ. Proc., rule 23(e), 28 U.S.C.) The purpose of the requirement is "the protection of those class members, including the named plaintiffs, whose rights may not have been given due regard by the negotiating parties." (*Officers for Justice v. Civil Service Com*., supra, 688 F.2d at p. 624.)
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> . . . Assuming the burden is on the proponents, a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. (Newberg & Conte, *supra*, § 11.41, pp. 11-91.)
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> . . . "'So long as the record . . . is adequate to reach "an intelligent and objective opinion of the probabilities of success should the claim be litigated" and "form an educated estimate of the complexity, expense and likely duration of such litigation, . . . and all other factors relevant

> to a full and fair assessment of the wisdom of the proposed compromise," it is sufficient.' [Citations.] Of course, such an assessment is nearly assured when all discovery has been completed and the case is ready for trial. [Citation.]" *(Ibid.)*

As applied in the context here, the determination of whether the settlement is fundamentally fair, adequate and reasonable involves balancing some or all of the following factors: 1) the relative strength of the Department's case; 2) the risk, expense, complexity and likely duration of further litigation, with the attendant delay in collecting any penalties or having an offending practice cease; 3) the amount of the settlement; 4) the amount of discovery done; 5) the state of the proceedings; 6) the experience and views of counsel and/or the parties' managers or experts; 7) the involvement of a governmental entity;[3] and 8) the reaction of consumers to the proposed settlement. (Cf. *Officers for Justice, supra*, 688 F.2d at p. 625*; Dunk v. Ford, supra*, 48 Cal.App.4th at p. 1801; *Protective Committee of Independent Stockholders v. Andersen* (1968) 390 U.S. 414, 424-425, 20 L.Ed2d 1, 88 Sup. Ct. 1157 (bankruptcy context).)

As the court stressed in *Officers for Justice*, review of the settlement should not be turned into a full hearing on the merits or a rehearsal for one. The approving tribunal is not to reach ultimate conclusions on the contested issues of fact and law. *(Ibid.)*

[3] In this regard, consideration should be given to the adequacy of the Department of Insurance's examination of the data submitted by the insurers and its application of governing statutes and regulations.

2. *Analysis*

In reviewing the settlement, the first question is whether there is sufficient evidence to conclude that the settlement is fair and reasonable. In the analysis of the *Dunk v. Ford* court, investigation and discovery should be sufficient to allow counsel and the tribunal to act intelligently. Here, the case was ready for trial and evidence, including testimony and exhibits, had already been admitted. This evidentiary record is available to the administrative law judge and the parties have even more knowledge of the facts.

From this evidence, it appears that a wide gulf existed between the positions and contentions of the parties. CDI's view is that certain business practices used by Allstate were in violation of the Insurance Code and regulations in title 10. While Allstate acknowledged the practices, it vigorously denied that they were in violation of any law. From the outset, it was clear that the dispute was largely a matter of first impression application of certain statutes and regulations in a mostly undisputed factual context; as such, the Department, even if successful at the administrative level, would undoubtedly have to defend its position in court challenges.

The other factors set forth in *Dunk v. Ford* as supporting a presumption of fairness are also present. This case was fiercely litigated by the Department and Allstate; settlement negotiations were attempted and failed several times. It is reasonable to conclude that the negotiations were conducted at "arm's length" and no allegation or evidence exists to the contrary.

More than one attorney on each side participated in the settlement negotiations, allowing different views to be aired. Moreover, counsel for both parties are known to the

administrative law judge as very experienced and vigorous advocates as well as reasonable people.

There have been no objections to the settlement, although the intervener was provided with an opportunity to do so.

Other policy reasons supporting settlements are also present here. The settlement avoids the risk and expense of further litigation, which, given the likelihood of appeal, is great. The settlement is in the public interest in the very real sense that it appears to result in a cessation of the administrative procedures alleged in the FAN to be in violation of the Insurance Code and title 10 of the Code of Regulations, as well as an end to the use of a credit-scoring program in Allstate's private passenger automobile line. Furthermore, a substantial penalty is being paid. While the description of the practices that have ceased could certainly be more precise, and a commitment to a permanent cessation made explicit, the parties are apparently willing to stipulate that the settlement does not restrain the Commissioner from enforcement activities regarding Allstate with the exception of "all acts, practices, and matters settled or resolved by this Stipulation[4]."

Thus, based on the evidence presented, it appears that if the Department chose to litigate this matter, it would not necessarily gain any more for the public than is gained through this settlement. Rather, it would most likely be expending resources needlessly. Such waste would not be in the public interest.

[4] Since both the Department and Allstate seem to be taking a risk in choosing this language, it can be assumed that the risk is a negotiated one.

For all the reasons discussed above and based on the facts as set forth in this proposed decision and in the record herein, the settlement, taken as a whole, is fundamentally fair, adequate and reasonable.

ORDER

For good cause shown, IT IS ORDERED that, pursuant to the terms of the Stipulation:

1) the Administrative Law Judge accepts the attached Stipulation for Settlement[5] of the parties, and recommends the adoption of the settlement to the Commissioner.
2) Respondents shall pay to the Department a penalty in the amount of three million dollars ($3,000,000). Respondents shall pay the penalty within thirty days after receiving an invoice for this amount from the Department.
3) This Stipulation constitutes a settlement and full and final release of all issues arising from acts covered in the FAN up to the date of this Stipulation. Nothing in this Stipulation precludes any action of the Department in pursuing further action against Respondent for failure to correct the actions that are the subject of this Stipulation.
4) Nothing contained in this Stipulation constitutes a limitation upon, or a waiver of, the rights and powers of the Commissioner to pursue an enforcement action as a result of the examination of the rating and underwriting practices of Respondents conducted by the Department's Field Rating and Underwriting Bureau which

[5] To the extent that the terms of the attached Stipulation for Settlement are not repeated here, they are nevertheless incorporated by reference with the same force and effect as if they were set forth herein. For instance, it is accepted as fact that Allstate has stopped certain practices and need not be ordered to continue this stoppage.

occurred during the period of January 1, 2000 to April 1, 2002, except with respect to all acts, practices, and matters settled or resolved by this Stipulation.

5) Nothing contained in this Stipulation constitutes a limitation upon, or a waiver of, the rights and powers of the Commissioner to enforce the California Insurance Code or the California Code of Regulations with respect to the transaction of insurance by Respondent, except with respect to all acts, practices, and matters settled or resolved by this Stipulation.

6) The Commissioner retains jurisdiction to ensure that the parties comply with the provisions and terms of this Stipulation.

7) In all other regards, this matter is closed.

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I submit this proposed decision on the basis of the record before me and I recommend its adoption as the decision of the Insurance Commissioner of the State of California.

DATED: January 22, 2004

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ANDREA L. BIREN
Chief Administrative Law Judge
Department of Insurance